

# **NO PROOF OF FORCE NEEDED: CHANGING TEXAS POLICY REGARDING ADOLESCENT VICTIMS OF INTRAFAMILIAL AGGRAVATED SEXUAL ASSAULT**

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*Where's my mommy? She should be here with me stopping this. I am just a baby. I am in a crib in a dark room. I can hear everything. Mommy and Daddy were talking and then someone is touching me, rubbing me, holding me close. Kissing me, my lips, rough kissing, a tongue. I feel his scratchy face against my face, between my legs. Help me mommy, please, help me. Don't let him do this to me. Am I asleep? Is it a dream? No it is happening. It feels so good. It feels so awful. I like it. I hate it. I hate it. He's my Daddy! Hands are everywhere, hands and things touching me, rubbing me, poking me, in me. Daddy keeps telling me he loves me and that is why. He tells me he loves me so much, more than he even loves mommy, more than he loves anything or anyone and I am his special little girl. He tells me it is what his little girl is for – to make him happy. To love him back because he loves me so much. He keeps telling me that it makes him happy when I make him feel good. He tells me it feels so good, so good that I should feel good too. But it feels awful, ugly, dirty, sick. I hate myself. He keeps telling me it's what every little girl does for her dad. It's how he knows I love him. I have to show him my love. I wanted to tell mother what daddy was doing to me. But he told me she'd be mad if I told. Mad because then she would know he loved me more than he loved her. 'Don't ever tell your mom,' he'd say. 'She wouldn't understand.' 'She might even throw you out of the house.' I wanted a lock on my door to keep him out, to let him in. I don't know what I wanted but I knew it was wrong. Why is this happening to me now, still. I'm 13 years old. When I was little I didn't know any better. I knew how awful it felt but daddy kept telling me it's what little girls did, what every little girl did for her dad. But it was wrong! I know that now, wrong! I don't know what to do – how to stop it. I love him. He's a monster. I love him. He's gross. I love him. I hate him. He's my dad. Mom is gone now. Dad told me she found out about us, about how much we loved each other and that is why she left. Sometimes I can't even go to school. He wants me home with him. Some kids might think it is cool staying home from school but I'd rather be anywhere than here, anywhere. Dirty that is how I feel most of the time. I hate men. I hate myself. I hate everything. Sometimes*

*my skin feels like it is crawling. I hurt myself. I dig my nails into my arms and legs. Make myself bleed because that hurt makes the other hurt go away. I started cutting into my legs with a small knife. Just little cuts. The blood is warm, wet like tears. I want to die. I think about it a lot. I think about how to do it. Then the pain will stop. I want it all to stop. It's really my fault. Daddy wouldn't do this to me unless I made him. He wouldn't touch me like that or let others do it, so many others. It must be me. Something is wrong with me. I want him to die so it will end. I want him to die. I love him. I hate Him. I hate me more. Dead. Dead.*<sup>1</sup>

Tina was fifteen years old when she died of kidney failure resulting from anorexia.<sup>2</sup> Child sexual abuse, like Tina's, can be found in all races and all socioeconomic levels.<sup>3</sup> Reports show that certain sub-groups of women, such as children, may suffer from sexual abuse rate as high as 62%.<sup>4</sup> One in five girls will be sexually victimized before the age of eighteen, almost all by a family member or an acquaintance.<sup>5</sup> In Texas, the sex crimes division of the San Antonio Police Department responded to

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1. See *TINA'S STORY* (A Shoots Production Film 2001). This video is available for purchase from Jewish Family and Children Services. Tina contacted the San Antonio Rape Crises Center for years, and before her death she sent her diary to the Center so other victims of intrafamilial sexual assault would know they are not alone. The movie was based on her diary. Emily Spicer, *Film Tells Teen's Story of Abuse; Tina's Story Relates Her 11 Years of Sexual Torture by Her Father and His Friends*, SAN ANTONIO EXPRESS NEWS, Aug. 13, 2001, 2001 WL 24772192.

2. See Spicer, *supra* note 1 (stating after 11 years of sexual abuse, Tina died of kidney failure related to her anorexia); KAREN KINNEAR, *CHILDHOOD SEXUAL ABUSE: A REFERENCE HANDBOOK*, 41 (1995) (stating many victims of sexual abuse are concerned about their physical appearance, some may lose weight, while others may gain weight to make sure that no one is attracted to them); see also Sana Loue, *Legal and Epidemiological Aspects of Child Maltreatment*, 19 J. LEGAL MED. 471, 480-81 (relating sexual abuse has been associated with eating disorders and feelings of helplessness and self-blame).

3. Melissa Fletcher-Stoeltje, *Fighting Child Sexual Abuse Epidemic Takes Money, Support*, SAN ANTONIO EXPRESS NEWS, Dec. 2, 2001, available at 2001 WL 30312596; see KINNEAR, *supra* note 2, at 20 (stating that in a random sample of over 900 adult women, D. Russell discovered one in six women were sexually abused by their step-fathers while one in forty were abused by their biological fathers); Loue, *supra* note 2, at 479 (stating that "child sexual abuse occurs across all socioeconomic strata, religious orientations, and races").

4. See John H. Biebel, *I Thought She Said Yes: Sexual Assault in England and America*, 19 SUFFOLK TRANSNAT'L L. REV. 153, 158-59 (1995) (stating that children are a subgroup of women who suffer a higher rate of sexual abuse but are rarely studied); Loue, *supra* note 2, at 478-79 (reciting that studies report 54% of women have experienced sexual abuse prior to age 18 when a broad definition of sexual abuse is used).

5. Fletcher-Stoeltje, *supra* note 3.

847 cases of aggravated sexual assault with a child during the year 2000.<sup>6</sup> However, larger numbers go unreported due to the secretive nature of intrafamilial sexual assaults.<sup>7</sup>

## I. INTRODUCTION

*It is true [that] rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.*<sup>8</sup>

Currently in Texas, the State only has to show sexual penetration occurred in order to convict a perpetrator of a first degree felony of aggravated sexual assault when the victim is younger than fourteen years of age.<sup>9</sup> No force has to be shown.<sup>10</sup> However, sexual assault victims fourteen to sixteen years of age must show that serious bodily harm occurred as a result of force in order to obtain a charge of aggravated sexual assault.<sup>11</sup> Force does not usually occur with intrafamilial sexual abuse due to the dynamics of authority between family members.<sup>12</sup> For this reason,

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6. Spicer, *supra* note 1.

7. See Thomasine Heitkamp and Tara Lea Muhlhauser, *Children in the Courts: Re-thinking and Challenging Our Traditions*, 66 N.D. L. REV. 649, 654 (1990) (asserting that the dynamics of secrecy surrounding cases of intrafamilial abuse limit the number of reports); see also Fletcher-Stoeltje, *supra* note 3 (expressing that family violence needs darkness to thrive and it depends on secrets to survive); Rebecca L. Thomas, *Adult Survivors of Childhood Sexual Abuse and Statutes of Limitations: A Call for Legislative Action*, 26 WAKE FOREST L. REV. 1245, 1249 (1991) (stating abusive sexual relationships "depend on concealment, emotional blackmail, threats, and an imbalance of power for their sustenance").

8. Beverly J. Ross, *Does Diversity in Legal Scholarship Make a Difference?: A Look at the Law of Rape*, 100 DICK. L. REV. 795, 806 (1996).

9. TEX. PEN. CODE ANN. § 22.021 (Vernon 1994 & Supp. 2002).

10. See TEX. PEN. CODE ANN. § 1.07(46) (Vernon 1994 & Supp. 2003) (defining serious bodily injury as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ").

11. See TEX. PEN. CODE § 22.021 (Vernon Supp. 2002). Aggravated sexual assault of a victim fourteen to sixteen years of age requires prohibited sexual penetration without consent in addition to either causing serious bodily injury, placing the victim in fear of their life or another person's life, or using or displaying a deadly weapon. *Id.*; see also TEX. PEN. CODE ANN. § 1.07(46) (Vernon 1994 & Supp. 2003) (defining serious bodily injury as "bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ").

12. See OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEP'T OF JUSTICE, CHILD ABUSE REPORTED TO THE POLICE 4-5 (2001) (stating that only 1-2% of

the State is frequently unable to punish perpetrators who sexually abuse family members between fourteen and sixteen years of age with the charge of aggravated sexual assault.<sup>13</sup> Therefore, the State can only charge perpetrators who sexually abuse family members between fourteen to sixteen years of age with sexual assault, resulting in a lower penalty.<sup>14</sup> The unfortunate effect is a legal disadvantage for an adolescent victim of intrafamilial sexual assault.<sup>15</sup>

At present, Texas requires adolescents who are between fourteen and sixteen years of age and victims of intrafamilial sexual assault to prove serious bodily injury<sup>16</sup> resulting from force in order to heighten the punishment of their perpetrators. As a result, Texas unjustly concedes two things. First, nonconsensual intercourse without force resulting in serious bodily injury is merely an act of sex.<sup>17</sup> Second, sexual relations between family members when one party is between fourteen and sixteen years of age is not considered to be as serious as other sexual assaults, if no force resulting in serious bodily injury is required in order to consummate the

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offenses by caretakers involved the use of weapons or resulted in injuries) [hereinafter CHILD ABUSE REPORTED TO THE POLICE]; LEORA N. ROSEN & MICHELLE ETLIN, *THE HOSTAGE CHILD: SEXUAL ABUSE ALLEGATIONS IN CUSTODY DISPUTES*, 12-13 (1986) (stating victims do not resist the father's demands for sexual contact because they are frightened and confused).

13. See *Smith v. State*, 719 S.W.2d 402, 404 (Tex. App. – Houston [1st Dist.] 1986, *no writ*) (commenting that even though the appellant created a situation in which the victim was forced to submit to his demands, it did not rise to the level of aggravated sexual assault because there was a lack of force); TEX. PEN. CODE ANN. § 22.021(e) (Vernon 1994) (stating that aggravated sexual assault constitutes a first degree felony); TEX. PEN. CODE ANN. § 12.32(a) (Vernon's 1994) (indicating that the penalty for first degree felony is imprisonment for life "or for any term of not more than 99 years or" not less than 5 years and, in addition, the court can impose a fine no greater than \$10,000).

14. See TEX. PEN. CODE ANN. § 22.011 (Vernon's 1994) (stating that sexual assault constitutes a second degree felony); TEX. PEN. CODE ANN. § 12.33 (Vernon's 1994 & Supp. 2003) (denoting the penalty for second degree felony is imprisonment of not greater than 20 years or not less than 2 years and, in addition, the court can impose a fine of no more than \$10,000).

15. See CHILD ABUSE REPORTED TO THE POLICE, *supra* note 12, at 2 (stating that sentences regarding offences against teenage victims were less severe than for other offenders). This may be due to a stereotypical view of the victim feeling responsible for his or her own victimization. *Id.*

16. See TEX. PEN. CODE ANN. § 1.07(46) (Vernon 1994) (defining serious bodily injury as that which "creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ").

17. See Heidi Kitrosser, *Meaningful Consent: Toward a New Generation of Statutory Rape Laws*, 4 VA. U. SOC. POL'Y & L. 287, 288 (1997) (stating that forcible rape laws recognize only the most violent forms of sexual coercion.) The law in some states finds that the non-consensual nature of sex is not enough by itself to make the act a crime. *Id.* at 292.

act.<sup>18</sup> Requiring force conveys a message that the sexual assault is not damaging enough without serious bodily injury.<sup>19</sup> It also furthers the requirement in Texas that adolescents either be seriously injured,<sup>20</sup> in fear of their life, or in fear of a deadly weapon before it is defined as a crime punishable between five and ninety-nine years to life.<sup>21</sup>

The State of New Jersey has an exception clause in their aggravated sexual assault statute that protects adolescents between thirteen to sixteen years of age from intrafamilial sexual assault.<sup>22</sup> The exception does not require the proof of seriously bodily injury resulting from force to constitute aggravated sexual assault when the perpetrator is either: related to the victim; has supervisory or disciplinary powers over the victim; or stands in loco parentis, which includes foster parents, within the household.<sup>23</sup> This comment advocates that Texas legislators should follow this New Jersey exception clause by adding it to the force requirement under the current aggravated sexual assault statute. This would protect Texas adolescents from an unhealthy home environment and prevent the family perpetrator from hiding within the sanctity of the family.

## II. HISTORY

*Deep water has no ford.  
The broad field has no end.  
Small stones have no number.  
A pretty girl has no kinsmen.*<sup>24</sup>

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18. See Ross, *supra* note 8 (summarizing that due to "deep-seated taboos, inhibitions, and psychological conflicts associated with sex, charges of rape that do not involve strangers are treated by police, prosecutors, judges, juries, and even a complainant's friends and family in a substantially different manner than are rapes perpetrated by strangers"); Susan Estrich, *Rape*, 95 YALE L. J. 1087, 1092 (1986) (differentiating "real" rape, which is committed by a stranger, and "non-traditional" rape, which occurs when the woman is raped by someone she knows).

19. See Kitrosser, *supra* note 17, at 292-93 (stating coercive sex is normal enough until it reaches a level of violence judged by a "male-centered, bar-fighting, boys-on-the-playground perspective that courts can understand").

20. TEX. PEN. CODE ANN. § 1.07(46) (Vernon's 1999).

21. See *McQueen v. State*, 423 So.2d 800, 807 (Miss. 1982) (Hawkins, J., dissenting) (questioning whether the victim should be mangled or see a deadly weapon and if so, we ignore the reality of fear and terror in a child's mind.)

22. N.J. STAT. ANN. § 2C:14-2 (West 2002).

23. *Id.*

24. JUDITH LEWIS HERMAN, *FATHER-DAUGHTER INCEST* 1 (1981) (*citing* Slovenian Folk Song).

### A. Incest: Prohibition and Restriction on Marriage

Incest is a prohibition against sex between close family members.<sup>25</sup> Historically, prohibition of and references to incest have influenced laws restricting incest.<sup>26</sup> Early references to incest can be found in Greek mythology and the *Bible*.<sup>27</sup> More current references to incest can be found in movies<sup>28</sup> and literature.<sup>29</sup> These references led to the development of laws in society.

The earlier laws, aimed at adults, were written to prevent sexual relations between close relatives in order to prevent birth defects associated with flawed genetic combinations.<sup>30</sup> These laws were not meant to pro-

25. GALE ENCYCLOPEDIA OF PSYCHOLOGY, 193 (2nd ed. 2001) [hereinafter GALE]; see KINNEAR, *supra* note 2, at 6 (stating sexual relations among family members are wrong); OXFORD AMERICAN DICTIONARY 331-32 (1980) (defining incest as prohibited sexual relations between family members) [hereinafter OXFORD]. See also KEITH GREEN AND MELODY GREEN, LAST DAYS MINISTRIES, INCEST, THE FAMILY SECRET, at <http://www.lastdaysministries.org/articles/incest.html> (last visited Mar. 13, 2003) (defining incest as sexual intercourse between persons who are too closely related to marry).

26. See LLOYD DEMAUSE, INST. FOR PSYCHOHISTORY, THE UNIVERSALITY OF INCEST, available at [www.psychohistory.com/htm/06a1-incest.html](http://www.psychohistory.com/htm/06a1-incest.html) (last visited Mar. 13, 2003) (stating that incest is the one universal trait that has been found in every known culture).

27. See *Leviticus* 18:7-18:9 (stating that one shall not uncover his father's or mother's nakedness); *Id.* at 20:11-20:12 (declaring that one shall not uncover his sister's or aunt's nakedness); *Deuteronomy* 27:22 (proclaiming that one will be cursed if he lies with his sister or step-sister); *Genesis* 19:36 (stating Lot married his daughter and then she bore his children); *Exodus* 6:20 (stating that Amram married his Aunt); see *Into Darkness: An Exploration of Incest in History and Entertainment*, at <http://www.darkhistory.com> (last visited May 12, 2003) [hereinafter *Into Darkness*] (noting that, in addition to Oedipus, "Greek Mythology is full of incestuous relationships," among them the creation of Chiron, born from Zeus and Ixion, son of Ares, and of Pandora by brothers Zeus, Hephaistos and Hermes).

28. See *THE GLADIATOR* (Universal Studios 2000) (showing Commodus lust for his sister Lucilla); *SLEEPWALKERS* (Columbia Tri-Star 1992) (showing Charles Brady's incestuous relationship with his on-screen mother); *FORREST GUMP* (Paramount Pictures 1994) (implying that Forrest's girlfriend's incestuous relationship with her father kept her from forming a healthy relationship).

29. See Jacob Grimm & Wilhelm Grimm, *All Kinds of Fur*, in *Incest in INDO-EUROPEAN FOLKTALES* (D.L. Ashliman trans., 1997), at <http://www.pitt.edu/~dash/grimm065.html> (last visited May 12, 2003) (describing how a father marries his own daughter after the death of his wife); see D.L. ASHLIMAN, *THE FATHER WHO WANTED TO MARRY HIS DAUGHTER* (1997), at <http://www.surelalunefairytales.com/pentamerone/15shebear1911.html> (last visited Mar. 14, 2003) (describing *The She-Bear* how a father who promises his dying wife not to marry unless he finds someone as beautiful as her, marries his own daughter and *Fair Maria Wood* stating how a father wanted to marry his daughter after his wife dies but his daughter hides and then marries him later); *Into Darkness*, *supra* note 27 (listing different movie and literature references to incest).

30. See Joanne Grossman, *Should the Law Be Kinder to "Kissing Cousins,"* THE WRIT, Apr. 8, 2002, available at <http://writ.news.findlaw.com/grossman/20020408.html> (last

tect children from intrafamilial sexual abuse, but rather to prevent inbreeding.<sup>31</sup>

Henry VIII created an early example of such a law in 1534.<sup>32</sup> This law, called "An Act Concerning the King's Succession," followed the book of *Leviticus* to legitimize Henry's marriage to Anne Boleyn and assured self-promotion and self-legitimization of his heirs.<sup>33</sup> This law did not prohibit sexual abuse of children by their parents but prohibited marriages between relatives. As a result of the laws regarding inheritance at that time, the law invalidated heirs to the throne but not intrafamilial sexual abuse.<sup>34</sup> Henry VIII's self-serving law legitimized his marriage and heirs by illegitimizing his past wives' current marriage and formed the incest laws in the United States.<sup>35</sup>

### B. *Early American Law Prohibiting Incest*

Henry VIII's Succession Act was used as a model to form early Connecticut and Vermont laws prohibiting incest.<sup>36</sup> The Connecticut General Court punished the crime of incest with a penalty of death for both parties.<sup>37</sup> Although a stiff sentence today, death was a common penalty for a multitude of crimes during that period.<sup>38</sup> The Vermont statute enacted in 1779 defined incest as marriage or carnal copulation between persons too closely related.<sup>39</sup> According to the Vermont statute, both parties were to be set in the stocks, whipped and made to wear the letter "I" on their clothing.<sup>40</sup> The punishment was comparatively light during that time and focused more on the moral indignation of the act by both parties.<sup>41</sup>

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visited Mar. 8, 2003) (stating that today's justification for the statutory incest laws are genetic problems for the children the union may produce).

31. Dan Cook, *Parents Who Rape Their Kids Don't Deserve a Break*, BUS. J. OF PORTLAND, Dec. 3, 1999, available at <http://www.portland.bizjournals.com/portland/stories/1999/12/06/tidbits.html> (last visited Jan. 4, 2003).

32. BRUCE THOMAS BOEHRER, *MONARCHY AND INCEST IN RENAISSANCE ENGLAND: LITERATURE, CULTURE, KINSHIP, AND KINGSHIP* 1 (1992).

33. *Id.*

34. *Id.*

35. *Id.* at 2.

36. *See id.* at 20 (stating that Henry VIII contributed to the shaping of an academic field that does not yet exist).

37. *See* Leigh B. Bienen, *Defining Incest*, 92 NW. U.L. REV. 1501, 1527-28 (1998).

38. *Id.* at 1528 (listing numerous death penalty offenses, including blasphemy, treason, arson, rape, murder, and even rebelliousness towards a parent, all with references to biblical sources).

39. *Id.* at 1525.

40. *Id.* at 1527 (explaining how both parties to the act were punished even though the statute only mentioned the prohibition of male sexual behavior).

41. *See id.* at 1527-28 (comparing how punishment evolved from mere social humiliation to the more serious punishment of death).



These traditional incest statutes provided orderly regulation of marriage.<sup>42</sup> The statutes may have also prevented inbreeding and affirmed moral and religious ideas that society gained from religious teachings.<sup>43</sup> These statutes finally provided a way to punish deviate or exploitative sexual behavior.<sup>44</sup> In essence, the Vermont and Connecticut incest statutes were not created to address sex crimes between family members but to promote societal values and medical findings.<sup>45</sup>

### C. Contemporary Confusion I: How to Handle Incest

*Frigid gentlewomen of the jury! I had thought that months, perhaps years, would elapse before I dared to reveal myself to Dolores Haze, but by six she was awake, and by six fifteen we were technically lovers. I am going to tell you something very strange: it was she who seduced me.*<sup>46</sup>

In the nineteenth century, the intent element for statutory rape was confused with the intent element for incest.<sup>47</sup> This confusion was due to prosecution of incest cases under statutory rape laws.<sup>48</sup> Although courts prosecuted allegations of incest under statutory rape laws, they also looked on the parties as co-conspirators.<sup>49</sup> Consequently, in an incest case, collaboration and outcry of the victim were required before incest could be proven.<sup>50</sup> Collaboration required a witness to testify to some

42. See *id.* at 1524-25 (showing that Vermont's 1779 statute "proscribes criminal punishment, declares marriage void, and regulates descent and distribution").

43. See *id.* at 1527-28. Many capital statutes of this time period cite biblical sources to prohibit certain acts. *Id.*

44. See *id.* (citing Connecticut's "Carnal Copulation" Law of 1650 including incest, bestiality, and rape).

45. See Joyce McConnell, *Incest Conundrum: Judicial Discourse on Private Wrong and Public Harm*, 1 TEX. J. WOMEN & L. 143, 146 (1992) (stating that incest taboo has served to protect society not the individual from harm). Incest taboos address "the genetic, social, and economic needs of human societies." *Id.* These taboos protect "society from genetic inbreeding, supports the development of alliances between families through the multiplication of kinship ties, and ensures the solidarity of families through the reduction of intrafamilial sexual competition." *Id.*

46. VLADIMIR NABOKOV, *Lolita*, in NOVELS 1955-1962, 124 (1996).

47. See Bienen, *supra* note 37, at 1533 (stating that the intent element for statutory rape is knowledge of the prohibited age and the intent element for incest is knowledge of the prohibited relationship).

48. See *id.* at 1534 (1998) (stating that incest cases came to be prosecuted under the statutory rape laws.)

49. See *id.* at 1534-35 (noting that when incest was committed by consenting adults it evolved into the idea that an under-aged daughter was an accomplice to the crime).

50. See *Bolin v. State*, 505 S.W.2d 912, 914 (Tex. 1974) (holding that without corroborating evidence that the victim did not consent to the incestuous relationship, the victim is "an accomplice as a matter of law"); *State v. Foust*, 588 P.2d 170, 173 (Utah 1978)

part of the victim's allegations.<sup>51</sup> This was due to the fact that the incest victim was determined to be a co-conspirator to the crime and co-conspirator testimony alone cannot convict another conspirator.<sup>52</sup> The "outcry requirement" required the victim to tell someone else of the incident alleged within a certain time period.<sup>53</sup> Eventually, the collaboration outcry requirement was not required to prove sexual abuse of a child by a non-family member if the victim told someone about the abuse within six months of the incident.<sup>54</sup> Thus, proving sexual abuse by a non-family member was easier to prove than sexual abuse by a family member.<sup>55</sup>

#### D. *Contemporary Confusion II: How to Handle Rape*

*If girls are not virgins, they are much less valuable as barterable merchandise between families or clans. Past marriages patterns were controlled by ongoing political and economic needs of male-headed families. Marry a virgin off well and you could gain powerful allies, or a chance at inheriting valuable property, or a friend at court. The incest ban guaranteed that daughters would be delivered to their husbands in a condition of virginity that would prevent occasions for disturbing the peace.*<sup>56</sup>

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(concluding absent corroborating evidence the "complainant is free to designedly point the finger of guilt at one, who, for lack of an alibi or witness, may find himself unlawfully incarcerated").

51. See *Carmell v. Texas*, 529 U.S. 513, 517-18 (5-4 decision) (2000). The majority held that applying the amended Texas statute that removed the corroboration requirement for victims eighteen years old or older to incest offenses committed under the old law requiring corroborative evidence for victims over fourteen years old violated the *Ex Post Facto* clause of the constitution. *Id.* 530.

52. See *Bolin*, 505 S.W.2d at 913 (holding that if the female is an accomplice witness, then there must be other evidence tending to inculcate the accused with the offense).

53. See *Carmell*, 529 U.S. at 517-18 (stating a victim's testimony can support a conviction only if there was corroborating evidence or the victim told another within six months of the incident).

54. Bienen, *supra* note 37, at 1540.

55. *Id.*; see JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW 736-47 (1915) (setting forth a doctrine to impeach the credibility of any female, especially a child, who complained of a sex offense). "Wigmore warned that women and girls are predisposed to bring false accusations against men of good character, and that these accusations might convince unsuspecting judges and juries." HERMAN, *supra* note 24, at 11; *Creekmoore v. State*, 860 S.W.2d 880, 884-87 (stating that when a parent is accused of abusing a child extraneous acts of abuse by the accused should be allowed). "For too long the victims of crime have been left out of the criminal process" and "this attitude gives an increasing number of victims and their families the impression the state is more concerned with the rights of the criminal than with those of the victim." *Id.* at 887.

56. BOEHRER, *supra* note 32, at 144; see CLAUDE LEVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP (1949). The incest taboo is also a special case of a more generalized principal of social organization called the rule of the gift. *Id.* The exchange of people

The confusion dealing with how to legally categorize incest was further compounded by courts' attempts to handle rape. Rape laws were instituted to protect females and patriarchal property interests in females.<sup>57</sup> At the time of the creation of rape laws, children were seen as property of the father or their male authority figure.<sup>58</sup> The virginity of the female child was also seen as an asset of the male authority figure.<sup>59</sup> A father could use his daughter's virginity to acquire a husband for her, thus relieving his financial burden of caring for an unmarried daughter.<sup>60</sup> In sum, the female child and her virginity were the property of the father. The person who violated this property did not owe restitution to the child but to the true owner of the property, the father.<sup>61</sup> Conversely, the father should be able to do with her as he wished and not receive punishment for any action.

Courts furthered this policy of protecting the patriarchal property rights<sup>62</sup> and the female's virginity in two ways. First, if a court discovered that the child was not a virgin at the time of the alleged intrafamilial sexual assault, they determined no harm had been caused.<sup>63</sup> Secondly, the court would reason that you cannot punish one for destroying one's

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in marriage, the most serious and lasting kind of gift-giving, is governed by the rule of exogamy. *Id.*

57. Michelle Oberman, *Girls in the Master's House: Of Protection, Patriarchy and the Potential for Using the Master's Tools to Reconfigure Statutory Rape Law*, 50 DEPAUL L. REV. 799, 802-03 (2001).

58. See *id.* (summarizing that statutory rape laws embodied that women and girls were special property and if "damaged" the man may have to pay a fine to the father or be required to marry her).

59. See Kitrosser, *supra* note 17, at 311-12 (discussing the "treasure theory" in statutory rape law which casts a woman's virginity in terms of a "sexual treasure" with personal, economic and social value); Oberman, *supra* note 57 (stating that a non-virgin was "less likely to bring a financial reward to her father").

60. See Oberman, *supra* note 57, at 802 (stating that if a daughter failed to marry because of her non-virgin status, she usually resulted in a life long financial burden to her father).

61. See *id.* (noting that the father could insist on restitution either in the form of monetary compensation or by commanding the rapist to marry his daughter); McConnell, *supra* note 45 (stating that the primary purpose of incest laws is to protect society and not to protect the victim whose "personal harm has gone unrecognized, ignored or regarded as secondary to the harm to society").

62. See HERMAN, *supra* note 24, at 219 (recollecting that after 20 years of studying incest, it is now understood that father-daughter incest is a common, predictable abuse of patriarchal power).

63. See Bienen, *supra* note 37, at 1544 (introducing evidence of the victim's previous sexual experience attempted to prove that no harm was done because the victim was not a virgin).

own property.<sup>64</sup> If the child was the father's property he could then do what he chose. The past statutory rape laws were created to protect the father's property from others,<sup>65</sup> not to protect his property from his own actions.

Even after most states began reforming their rape laws in the 1970s,<sup>66</sup> which eliminated the strong patriarchal property reference, rape laws still include language from earlier times. Statutes still contain language distinguishing between certain ages of children that are in need of protection from sexual assault.<sup>67</sup> State statutes distinguish between ages of victims to further the view that younger children need more protection than adolescents.<sup>68</sup> This distinction is a reflection of society's belief "that children below a certain age are incapable of making significant, life-altering decisions."<sup>69</sup> In accordance, the model penal code suggests that states should limit their laws to protecting girls under age ten reasoning that 99% of nine year-old girls are pre-pubescent.<sup>70</sup> Even after the rape reform movement, there is a struggle by the States to statutorily protect adolescents and reflect a change in society's belief at what age a child can be expected to resist or consent to sexual contact.<sup>71</sup>

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64. See Lisa Haberman, *The Seduction of Power: An Analogy of Incest and Antebellum Slavery*, 13 HASTINGS L. J. 307, 311, 313 (2002) (stating that the relationship between master and slave is similar to parent and child). Defenders of slavery likened the master/slave relationship to the parent/child relationship, comparing slavery property interest and reasoning that children may fall under the same class. *Id.* Supporters of slavery compared the rights to the services of the slave to children and women, all resting upon common property principles. *Id.*

65. See *id.* at 312 (stating that "sexual injuries to females historically have not been taken seriously unless they interfered with the property-like interest that a father, husband or brother had in the female.") These theories can explain why an incestuous relationship has been ignored. *Id.*

66. See Michelle Oberman, *Regulating Consensual Sex with Minors: Defining a Role for Statutory Rape*, 48 BUFF. L. REV. 703, 710-11 (2000).

67. See Oberman, *supra* note 57, at 804 (stating that during the twentieth century, statutory rape laws still protected the male version of the "treasure theory" of virginity).

68. See Charles A. Phipps, *Children, Adults, Sex and Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 34-35 (1997). The State's duty to protect children who cannot protect themselves is sufficient when they are very young. However, older children are not allowed the same protection due to gender stereotypes of girls being inherently weak. *Id.*

69. See *id.* at 33-34 (stating that pre-pubescent children are incapable of giving consent); see also *Nider v. Commonwealth*, 131 S.W. 1024, 1027 (Ky. 1910) (stating that "[t]he statute was enacted to protect female children who are of such tender years as to be unable to appreciate the enormity of this offense").

70. See Model Penal Code § 213.1 (1980).

71. See OFFICE FOR VICTIMS OF CRIME, U.S. DEP'T OF JUSTICE, STATE LEGISLATORS' HANDBOOK FOR STATUTORY RAPE ISSUES 2 (2000) (noting that North Carolina and Pennsylvania raised the age to sixteen that would be covered by the statutory rape laws).

E. *Additional Policy Reasons For Not Believing Accusations of Intrafamilial Sexual Abuse*

*Almost all of my women patients told me that they had been seduced by their father. I was driven to recognize in the end that these reports were untrue and so came to understand that the hysterical symptoms are derived from phantasies and not from real occurrences. It was only later that I was able to recognize in this phantasy of being seduced by the father the expression of the typical Oedipus complex in women.*<sup>72</sup>

The question of what age a child acquires the ability to resist or consent to sexual activity in addition to the distrust of young girls who assert allegations of intrafamilial sexual abuse<sup>73</sup> may be influenced by the Oedipus and Electra complexes popularized by Sigmund Freud.<sup>74</sup> Freud characterized children between the ages of three and five as having an incestuous desire toward the parent of the opposite sex.<sup>75</sup> Oedipus refers to a son's incestuous desires for his mother and Electra to a daughter's incestuous desire for her father.<sup>76</sup>

These Freudian theories have furthered the court's dismissal of incest charges by reasoning that females fantasize about relations with their fathers, citing the Electra complex.<sup>77</sup> Their reasoning is that if the abuse is a fantasy of the child, then no act or harm occurred to the child.<sup>78</sup> Thus, the courts exonerated a supposed innocent father from the feared false accusations.<sup>79</sup>

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72. HERMAN, *supra* note 24, at 7 (quoting Sigmund Freud).

73. See Cynthia Ann Wicktom, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 402-03 (1988) (noting that courts "have distrusted testimony of rape victims because women will lie about consent for various reasons").

74. See Leigh Bienen, *A Question of Credibility: John Henry Wigmore's Use of Scientific Authority in Section 924a of the Treatise of Evidence*, 19 CAL. W.L. REV. 235, 236 (1983) (stating that Sigmund Freud went to extreme lengths to suppress his own patients' allegations of childhood sexual abuse as fantasies); Joseph J. Peters, *Children Who Are Victims of Sexual Assault and the Psychology of Offenders*, 30 AM. J. PSYCHOTHERAPY 398, 401 (1976).

75. GALE, *supra* note 25, at 193.

76. *Id.*

77. See HERMAN, *supra* note 24, at 9 (stating that in 1896, Freud announced that childhood sexual trauma was the origin of every case of hysteria). Freud still referred to seduction by the father as an essential role in hysteria in personal correspondence but after publicly renouncing the possibility never again publicly referred to fathers as sexual aggressors of their daughters. *Id.*

78. Bienen, *supra* note 37, at 1542.

79. *Id.* at 1544.

Freudian thought, combined with sexologists theory that incest could be a positive, healthy experience, and that there was nothing wrong in being a pederast or a rapist if the perpetrator is satisfied sexually,<sup>80</sup> may have reinforced decisions not to penalize a father's sexual abuse of his children.<sup>81</sup>

#### F. *Contemporary Confusion III: Intrafamilial Sexual Abuse in Family Courts*

The family court is presented with additional biases in the custody or visitation context. First, whereas the objective of the criminal court is to hold the perpetrator accountable,<sup>82</sup> the family court's objective is focused on maintaining the family while promoting the welfare of the individuals within, particularly children.<sup>83</sup> However, it is often not in the victim's best interest to keep the family together,<sup>84</sup> especially when treatment of the intrafamilial perpetrator has proven itself ineffective.<sup>85</sup> In addition, treatment is a comparatively lighter sentence than incarceration, which provides the family perpetrator with a lower penalty than the perpetrator who has assaulted children outside their family unit.<sup>86</sup>

Second, family courts do not provide the same constitutional safeguards to individuals accused by family members of sexual abuse, as do other courts in extra-familial sexual abuse cases. This may result in abuse of the system. The rights that are denied defendants in cases of intrafamilial sexual abuse include the right to an attorney at state expense, the right to a jury trial, and the right to confront witnesses. The failure to provide these rights can interfere with the final disposition of a case in

80. See DeMause, *supra* note 26 (finding that scholars have justified incest by showing the widespread occurrence of incestuous relationships); *Mr. Doubleena's Incest Forum*, at <http://www.doubleena.com/ubb/Forum/HMTL/000487.html> (last visited Jan. 4, 2003) (finding comfort in other's pederast or incestuous experiences and fantasies).

81. Bienen, *supra* note 37, at 1542-43.

82. See Donald C. Bross, *Terminating the Parent-Child Legal Relationship As a Response to Child Sexual Abuse*, 26 LOY. U. CHI. L.J. 287, 295 (1995). The objective of the criminal court is to deter crimes against children by holding the perpetrator accountable. *Id.* In contrast, the civil court is focused on the safety of the child, parents, or family through placement or adoption of the child and treatment of the perpetrator. *Id.*

83. McConnell, *supra* note 45, at 150.

84. See HERMAN, *supra* note 24 at 159-60 (describing the debate in the therapeutic community as to whether it is necessarily in the best interest of the child to maintain the family).

85. See Leonore M. J. Simon, *Do Criminal Offenders Specialize in Crime Types?*, 6 APPLIED & PREVENTIVE PSYCHOLOGY 35, 45 (1997).

86. See Leonore M. J. Simon, *Sex Offender Legislation and the Antitherapeutic Effect on Victims*, 41 ARIZ. L. REV. 485, 494-95 (1999) (illustrating a statute that determines punishment for sexual offenders on the basis of whether the offender is a stranger or a family member, with incarceration for the former and treatment for the latter).

family court.<sup>87</sup> The lack of constitutional safeguards, combined with the often-hostile nature of a custody dispute, furthers the argument in favor of protecting the alleged perpetrator from false accusations.<sup>88</sup>

Third, lack of constitutional safeguards for the accused is further compounded by not requiring collaboration in a sexual assault allegation in the family court setting.<sup>89</sup> Because supporting evidence or collaboration is rarely available in an intrafamilial sexual assault allegation, the child's disclosure or the accusation of a victim's parent is the only evidence presented.<sup>90</sup> Justifiably, the court should approach the allegation with caution and reluctance, especially when the allegation alone can serve the divorcing spouse's personal agenda of obtaining sole custody<sup>91</sup> or terminating the alleged perpetrator's parental rights.<sup>92</sup>

Finally, in consideration of the foregoing matters, a family court judge may feel pressure to encourage parents to reach an agreement to limit custody/visitation rights to the victim instead of pursuing a contested trial on the abuse issues.<sup>93</sup> This course of action may result in fewer intrafamilial sexual abuse perpetrators being incarcerated. Worse, it leaves the perpetrator with continuing access, although limited or restricted, to the victim.<sup>94</sup>

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87. Hon. Patricia S. Curley, *Some Suggestions for Dealing with Sexual Assault Allegations in Family Court*, 15 NO. 4 FAIR\$HARE 17, 18 (1995).

88. See Patrick Parkinson, *Family Law and Parent-Child Contact: Assessing the Risk of Sexual Abuse*, 23 MELB. U. L. REV. 345, 348 (1999) (noting to the contrary that 2.5% of 551 United States cases studied resulted in erroneous reports).

89. Curley, *supra* note 87.

90. See Parkinson, *supra* note 82, at 347 (stating that a "major problem is the inherent difficulty in obtaining corroborative evidence" to support allegations of a parent or the disclosure of the child).

91. Curley, *supra* note 87.

92. See Bross, *supra* note 85, at 306-18. Courts have used the following factors in evaluating whether to terminate parental rights in a sexual abuse allegation: the perpetrator's denial of abuse and lack of progress in therapy, the severity of the abuse, whether sexual abuse of the child was accompanied by other forms of abuse, and whether a substantial risk of sexual abuse of other children exists. *Id.*

93. Curley, *supra* note 90.

94. See Theodore P. Cross et al., *Prosecution of Child Sexual Abuse: Which Cases Are Accepted?*, 18 CHILD ABUSE & NEGLECT 663, 664, 667 (1994) (stating that proportionately more cases of extrafamilial child sexual abuse are prosecuted than cases of parental or familial abuse). Other factors that may increase the likelihood of prosecution include: the presence of oral-genital contact, the use of force, the duration of the abuse and the presence of physical and eyewitness evidence. *Id.* at 669.

### III. LEGAL THEORY AND CASE LAW REGARDING INTRAFAMILIAL SEXUAL ABUSE

#### A. *Alabama: A State Not Willing to Include the Whole Family in "Intrafamilial"*

Presently, Alabama requires evidence of forcible compulsion to prove rape in the first degree.<sup>95</sup> Forcible compulsion is defined as "physical force that overcomes earnest resistance or a threat, express or implied, that places a person in fear of immediate death or serious physical injury to himself or another person."<sup>96</sup> The Alabama courts have attempted to form an exception for victims of intrafamilial sexual abuse by expanding the definition of implied threat, which places a person in fear of immediate death or serious physical injury.<sup>97</sup> Alabama has reasoned that the position of the parent alone may provide the implied threat that placed the victim in fear and caused them to submit without force.<sup>98</sup> The courts have further expanded the implied threat to other family members and authority figures.<sup>99</sup> The Alabama Supreme Court has recently rejected this expansion.

The Supreme Court of Alabama in *Ex parte J.A.P.*,<sup>100</sup> decided not to extend the implied threat theory to sibling perpetrators of intrafamilial sexual abuse.<sup>101</sup> In *J.A.P.*, a brother sexually assaulted his sister repeatedly for years.<sup>102</sup> The victim did not resist nor did the defendant use force to complete the sexual assault.<sup>103</sup> Before each assault the defendant would play a pornographic video.<sup>104</sup> Thus, each time a pornographic movie was shown, the victim knew what to expect.<sup>105</sup> Although the Court of Criminal Appeals found force, by using the implied threat theory and totality of the circumstances, the Alabama Supreme Court re-

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95. ALA. CODE § 13A-6-61 (2002).

96. ALA. CODE § 13A-6-60 (2002).

97. See *Powe v. State*, 597 So.2d 721, 726-29 (Ala. 1991) (holding that the force element in a rape case differs if the victim is a child, as a child is susceptible to implied force of the child-parent role, or the adult position of dominion over a child).

98. See *id.* at 728-29 (Ala. 1991) (noting that when a defendant who plays as an authoritative figure in a child's life instructs the child to do certain actions, an implied threat accompanies the instruction).

99. See *B.E. v. State*, 778 So.2d 863 (Ala. Crim. App. 2000) (extending an "authoritative figure" to include a babysitter who sexually abused an eight year old child).

100. 2002 WL 31002843 at \*4-\*5 (Ala. 2002).

101. *Ex parte J.A.P.*, 2002 WL 31002843 at \*4-\*5 (Ala. 2002); *Powe*, 597 So.2d at 729.

102. 2002 WL 31002843 at \*4-\*5 (Ala. 2002).

103. *Id.*

104. *Id.*

105. *Id.*



versed that decision, stating the implied threat theory should only apply to parental perpetrators.<sup>106</sup>

The Alabama Supreme Court has refused to expand the meaning of forcible compulsion in sexual offenses involving child victims to encompass situations that would not constitute forcible compulsion if the victim were an adult.<sup>107</sup> Even though, the Alabama Supreme Court has previously accepted the implied threat theory as applicable to parental perpetrators, they would not extend it to include older sibling perpetrators.<sup>108</sup> Not only did the Alabama Supreme Court divert from precedent by not finding force in *J.A.P.*, they also diverted from precedent by not extending the implicit threat theory to siblings.<sup>109</sup>

The decision by the Alabama Supreme Court also reversed *B.E.* and further narrowed the implicit threat theory only to adult parental perpetrators.<sup>110</sup> In essence, Alabama children under seventeen but over twelve who are sexually assaulted will not be able to seek aggravated sexual assault unless force is used to complete the act.<sup>111</sup> If the actor is either over the age of sixteen or is a parent who sexually assaults the adolescent victim, the victim cannot seek a higher penalty without proving force.<sup>112</sup>

#### B. *Federal Awareness: Unwilling to Recognize the Dynamics of Intrafamilial Sexual Abuse*

The Child Abuse Reform and Enforcement Act of 1999, or CARE Act of 1999, was introduced to the House "to promote the improvement of information on, and protections against, child sexual abuse."<sup>113</sup> The bill proposed to reduce federal grant monies to states that did not meet specific requirements of the bill.<sup>114</sup> One of these requirements would have been to commission a study of state laws regarding the disparity in charging and sentencing options for the perpetrator of intrafamilial and ex-

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106. *Id.*

107. *Id.*

108. See *Pittman v. State*, 460 So.2d 232 (Ala. Crim. App. 1984) (finding implied threat of a step-father constituted coercion or force); *Parrish v. State*, 494 So.2d 705 (Ala. Crim. App. 1986) (finding implied threat of a mother's boyfriend constituted coercion or force.)

109. *B.E. v. State*, 778 So.2d 863 (Ala. Crim. App. 2000), *overruled by Ex parte J.A.P.*, 2002 WL 31002843 (Ala. 2002); *Powe v. State*, 597 So.2d 721, 723 (Ala. 1991).

110. 2002 WL 31002843, \*4-\*5 (Ala. 2002).

111. ALA. CODE § 13A-6-61 (2002).

112. *Id.* Even though Alabama refused to extend the implied threat theory beyond parents, there is hope. Two other states have extended the implicit threat theory in which the defendant was a next-door neighbor and a sister's ex-husband. *Commonwealth v. Rhodes*, 510 A.2d 1217 (Pa.1986); *McQueen v. State*, 423 So.2d 800 (Miss. 1982).

113. Child Abuse Reform and Enforcement Act, H. R. 2382, 106th Cong. (1999).

114. *Id.*

trafamilial child sexual abuse, and the resulting effect upon victims.<sup>115</sup> It would have also required states to address legislative actions necessary to equalize charging and sentencing perpetrators of sexual abuse without regard to familial relationship of the perpetrator to the child victims.<sup>116</sup> However, this bill died in a subcommittee and has not been re-introduced as of September 27, 2002.<sup>117</sup>

C. *New Jersey: Correct Statutory Policy Regarding Intrafamilial Sexual Abuse Perpetrator Prosecution*

The state of New Jersey enacted its sexual assault statute in 1979, which does not require force to prosecute intrafamilial sexual abuse.<sup>118</sup> In 1989, New Jersey incorporated the intrafamilial sexual assault exception to exclude the force required to prove aggravated sexual assault.<sup>119</sup> In 1997, the New Jersey legislature enlarged the scope of the statute, by amending the definition of aggravated sexual assault to apply whenever the actor either knows or should have known the victim was either physically helpless and or mentally incapacitated or defective.<sup>120</sup> This amendment was due to the use of date rape drugs across New Jersey, as well as the United States.<sup>121</sup>

Although the amendment was initially introduced as a response to the threat of date rape drugs,<sup>122</sup> the version ultimately adopted, negated any specific enhancement requirements and applied the harshest penalties in accordance with the victim's status instead of the perpetrators acts.<sup>123</sup> Thus, the effect of the 1989 and 1997 amendments was a justifiable enlargement of New Jersey's sexual assault statute. Unlike Texas, the current New Jersey law focuses on the condition of the victim at the time of the sexual assault instead of the actions of the perpetrator, or lack thereof, to apply the harshest punishment.<sup>124</sup>

New Jersey has two requirements that will constitute force.<sup>125</sup> First, when the sexual assault is attempted and or committed by multiple persons during the commission of specific crimes, the law holds the required

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115. *Id.*

116. *Id.*

117. *Id.*

118. *See* N.J. STAT. ANN. § 2C:14-2 (West).

119. 1989 N.J. Sess. Law Serv. 228 (West).

120. 1997 N.J. Sess. Law Serv. 194 (West); N.J. STAT. ANN. § 2C:14-2 (West 2002).

121. 1997 N.J. Sess. Law Serv. 194 (West).

122. N.J. STAT. ANN. § 2C:14-2 (West 1995 & Supp. 2003).

123. *Id.*

124. *Id.*

125. *Id.*

showing of force is not needed due to the aggravating circumstances.<sup>126</sup> Secondly, if during the commission of the sexual assault, the perpetrator is armed with a weapon and threatens by word or gesture to use it, the requirement of force is met.<sup>127</sup>

In 1983, the Supreme Court of New Jersey remarked that intrafamilial crime was one of the most disturbing aspects of contemporary life.<sup>128</sup> The governor of New Jersey in the mid-1980s responded to the problem by establishing a task force to study intrafamilial sexual assault.<sup>129</sup> As a result, the Legislature classified intrafamilial sexual assault differently than sexual assaults occurring in general.<sup>130</sup> Accordingly, "the state must prove beyond a reasonable doubt that sexual penetration occurred;" that the victim is at least thirteen years of age, but less than sixteen years of age when the incident happened; and that the perpetrator and the victim are related to the third degree to obtain a conviction of aggravated sexual assault.<sup>131</sup>

Along with the statutory exception, the New Jersey Court of Appeals has allowed prior incidents of sexual abuse between the same victim and a family perpetrator to be used as evidence in the current charge.<sup>132</sup> The court reasoned that this type of evidence is critical to the jury's understanding of why a victim thirteen to sixteen years of age may not resist the perpetrator's advances.<sup>133</sup> By allowing prior incidents of sexual abuse, New Jersey extends the circumstances that should be used to facilitate the victim to prosecute their family perpetrator.

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126. See N.J. STAT. ANN. § 2C:14-2(a)(3) (West 1995 & Supp. 2003).

127. See N.J. STAT. ANN. § 2C:14-2 (a)(4) (West 1995 & Supp. 2003).

128. See *State v. Hodge*, 471 A.2d 389, 394 (N.J. 1983) (noting that in 1983, then Governor Kean created a task force to examine "the problem of child abuse.")

129. *Id.*

130. *Id.*

131. *Campbell v. Scheidemantel*, Civ. A. No. 89-4637, 1990 WL 182333 at \*7 (D.N.J. 1990).

132. *State v. L.P.*, 768 A.2d 795, 801-02 (N.J. Super. Ct. App. Div. 2001).

133. See *id.* (noting that the evidence was allowed because: 1) "young children do not think in terms of dates or time spans," 2) the victim was unlikely to be able to differentiate the details of sexual offenses, for example the thirteenth rape as opposed to the fourteenth rape, 3) the victim's experience began with the most traumatic rape, and thus would grow less able to differentiate between the rapes, and 4) "the testimony about the earliest attacks was critical to the jury's understanding of the facts and context of the crime").

D. *Texas: Legislator's Failure to Protect Adolescent Victims of Intrafamilial Sexual Abuse*

In 1983, Texas enacted a statute recognizing the crime of aggravated sexual assault.<sup>134</sup> Examples of additional aggravating circumstances are serious bodily injury or an attempt to cause death of the victim.<sup>135</sup> Aggravated sexual assault could also be found if the acts or words of the perpetrator placed the victim in fear of death, serious bodily injury or kidnapping, or the perpetrator used or exhibited a deadly weapon.<sup>136</sup> The statute also included that if a victim was less than fourteen years of age the requirements of serious bodily injury, fear of death by the victim or the use of a deadly weapon were not needed to prove aggravated sexual assault.<sup>137</sup> Currently, the adolescent victim between fourteen and sixteen years of age must prove force resulting in serious bodily injury to seek aggravated sexual assault.<sup>138</sup>

This statute has been amended seven times since enacted in 1983.<sup>139</sup> In 1987, legislators amended this section to include the actual requirements for the offense of sexual assault along with the mitigating factors to establish aggravated sexual assault.<sup>140</sup> The statute was amended again in a called session of the 1987 legislation to add language to include sexual assault of male children because the previous statute was female oriented.<sup>141</sup> In 1993, the legislature added the second condition that would substitute for the force requirement.<sup>142</sup> If a perpetrator acted in concert with another to commit an act of sexual assault on another, the perpetrator could be charged with aggravated sexual assault without proving

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134. See Act of June 19, 1983, 68th Leg., R.S., ch. 977 §3, 1993 Tex. Gen. Laws 5315 (amended 1987) (current version TEX. PEN. CODE ANN. §22.021) (Vernon 1994 & Supp. 2003).

135. *Id.*

136. *Id.*

137. *Id.*

138. See TEX. PEN. CODE ANN. § 22.021 (Vernon 1994 & Supp. 2003). The statute refers to §22.011(c) to define a child. A "child" is a person who is younger than seventeen years of age" and "not the spouse of the actor." *Id.*

139. See *id.* The historical and statutory notes indicate the statute has been amended seven times since 1983. *Id.*

140. Act of June 19, 1983, 68th Leg., R.S., ch. 977 § 3, 1993 Tex. Gen. Laws 5315 (amended 1987) (current version TEX. PEN. CODE ANN. §22.021) (Vernon 1994 & Supp. 2003).

141. Act of Aug. 3, 1987, 70th Leg., 2nd C.S., ch. 16 § 1, 1987 Tex. Sess. Law Serv. 2nd C.S. 16 (amended 1993) (current version TEX. PEN. CODE ANN. §22.021) (Vernon 1994 & Supp. 2003).

142. Act of June 19, 1993, 73rd Leg., R.S., ch. 900, §1.01, sec. 22.021, 1993 Tex. Sess. Law Serv. (Vernon) (current version at TEX. PEN. CODE ANN. §22.021) (Vernon 1994 & Supp. 2003).

force.<sup>143</sup> In 1995 and 1999, the Texas legislators added two more exceptions from the force requirement.<sup>144</sup> The 1995 amendment provided that if a perpetrator committed an act of sexual assault on someone over the age of sixty-five, it was considered aggravated sexual assault and no force was needed.<sup>145</sup> In 1999, the legislators added that if certain drugs were administered in order to facilitate the sexual assault, it would be considered aggravated sexual assault and no force was needed.<sup>146</sup>

To summarize, Texas has implemented the following exceptions from the force requirement resulting of aggravated sexual assault. The exceptions from the force requirement are if the victim is younger than fourteen years of age or the victim is sixty-five years of age or older.<sup>147</sup> Force occurs if the actor uses or "exhibits a deadly weapon in the course of the same criminal episode," acts with an accomplice in a sexual assault against the same victim, or administers a drug referred to as date rape drugs.<sup>148</sup>

Texas case law has interpreted the requirements of forcible rape and rape of a female under the age of eighteen, which later becomes sexual assault and aggravated sexual assault. In 1950, the Texas Criminal Court of Appeals stated that a child who was sixteen years of age and sexually assaulted by her father still had the duty to resist her father by using all force in her power.<sup>149</sup> The father was required to put forth the force to overcome his daughter's resistance.<sup>150</sup> Therefore, if there is no resistance to overcome then there is no forcible rape. The court then recognized that the resistance of a child would naturally be less than an adult female and even less when the sexual assault involved a parent.<sup>151</sup> Sadly, the Texas Criminal Court of Appeals did not expand on this theory.<sup>152</sup> In 1969, the same court determined that no rape had occurred when a step-

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143. *Id.*

144. Act of June 7, 1995, 74th Leg., R.S., ch. 318 §7, sec. 22.021, 1995 Tex. Sess. Law Serv. Ch. 318 (Vernon) (current version at TEX. PEN. CODE ANN. §22.021) (Vernon 1994 & Supp. 2003).

145. *Id.*

146. See Act of Sept. 1, 1999, 76th Leg., R.S., ch. 417 §1, sec. 22.021, 1999 Tex. Sess. Law Serv. Ch. 417 (Vernon) (current version at TEX. PEN. CODE ANN. §22.021) (Vernon 1994 & Supp. 2003).

147. TEX. PEN. CODE ANN. § 22.021 (Vernon 1994 & Supp. 2003).

148. *Id.*

149. *Lewis v. State*, 154 Tex. Crim. 329, 331, 226 S.W.2d 861, 863 (1950).

150. *Id.*

151. See *id.* at 863-64 (1950) (suggesting that because the girl was the daughter of the accused, a different degree of resistance might be considered.)

152. See *Zamora v. State*, 449 S.W.2d 43, 47 (Tex. Crim. App. 1969) (ruling that while the prosecutrix "being the child of the father, reared by him, and under tutelage and guidance, might call for a different degree of resistance than if the accused were a stranger," she nevertheless "is expected to exercise some resistance to her father's advances").

father had sexual relations with his stepdaughter because the stepdaughter did not resist in anyway, cry out nor did her stepfather have to use force.<sup>153</sup> The court weighed these factors along with the fact that the sexual contact between the two had been ongoing for six years and concluded that the conduct did not constitute rape.<sup>154</sup> The court distinguished this case from previous convictions of intrafamilial sexual abuse on the grounds that there was no resistance by the victim.<sup>155</sup> The court further stated that the threats that occurred after the incident would not meet the force requirement because they were not made to cause the child to yield to the father's sexual advances.<sup>156</sup>

In 1986, Texas seemingly extended the implied threat to include situations that involved intrafamilial sexual abuse.<sup>157</sup> It was a false implication of the implied threat because the charge was sexual assault not aggravated sexual assault, because no proof of force was found. Even though the court did not find serious bodily injury resulting from force, they conceded when a "person involuntarily faces distasteful options, it is very human to select that option that is least distasteful."<sup>158</sup> The court further conceded that the father had created an environment where the child was forced to submit to his wishes or face the alternative beatings.<sup>159</sup> After conceding to a possible implied threat, the court did not find serious bodily injury had occurred or that any threats of death or serious bodily injury had occurred and thus did not constitute a charge of aggravated sexual assault.<sup>160</sup>

#### E. *Statutory Proposal to Correct Current Positive Results for Perpetrators of Intrafamilial Sexual Abuse*

In order for Texas to correct the current aggravated sexual assault statute in regards to intrafamilial sexual assault, the legislature should enact a bill adding another exception to the force requirement of aggravated sexual assault. The proposed addition to the current aggravated sexual abuse statute follows:

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153. *Id.*

154. *See id.* (finding "that evidence was insufficient" because victim failed to struggle against her stepfather).

155. *See id.* (concluding that the facts indicated that the sixteen year old victim "went to the [perpetrator's] bedroom on the date in question. . . , [did] not try to leave, t[ook] off part of her clothes at his request, m[ade] no outcry, and d[id] not resist in any way even though she acknowledge[d] she knew what was going to happen when she sat on the bed").

156. *Id.*

157. *Smith v. State*, 719 S.W.2d 402, 403-04 (Tex. App.- Houston [1st Dist.] 1986, *no writ*).

158. *Id.* at 403.

159. *Id.* at 403-04.

160. *Id.*

## § 22.021. Aggravated Sexual Assault

## (a) A person commits an offense:

## (1) if the person:

## (A) intentionally or knowingly:

(i) causes the penetration of the anus or female sexual organ of another person by any means, without that person's consent;

(ii) causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or

(iii) causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or

## (B) intentionally or knowingly:

(i) causes the penetration of the anus or female sexual organ of a child by any means;

(ii) causes the penetration of the mouth of a child by the sexual organ of the actor;

(iii) causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor;

(iv) causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or

(v) causes the mouth of a child to contact the anus or sexual organ of another person, including the actor; and

## (2) if:

## (A) the person:

(i) causes serious bodily injury or attempts to cause the death of the victim or another person in the course of the same criminal episode;

(ii) by acts or words places the victim in fear that death, serious bodily injury, or kidnapping will be imminently inflicted on any person;

(iii) by acts or words occurring in the presence of the victim threatens to cause the death, serious bodily injury, or kidnapping of any person;

(iv) uses or exhibits a deadly weapon in the course of the same criminal episode;

(v) acts in concert with another who engages in conduct described by Subdivision (1) directed toward the same victim and occurring during the course of the same criminal episode; or

- (vi) administers or provides flunitrazepam, otherwise known as rohypnol, gamma hydroxybutyrate, or ketamine to the victim of the offense with the intent of facilitating the commission of the offense;
- (B) the victim is younger than 14 years of age; or
- (C) the victim is at least 14 but less than 16 years of age; and
  - [i] the actor is related to the victim to the by blood or affinity to the third degree; or
  - [ii] the actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional, or occupational status; or
  - [iii] the actor is a foster parent, a guardian, or stands in loco parentis within the household; or
- <(C)> [D] the victim is 65 years of age or older.
- (b) In this section, "child" has the meaning assigned that term by Section 22.011(c).
- (c) An aggravated sexual assault under this section is without the consent of the other person if the aggravated sexual assault occurs under the same circumstances listed in Section 22.011(b).
- (d) The defense provided by Section 22.011(d) applies to this section.
- (e) An offense under this section is a felony of the first degree.<sup>161</sup>

#### IV. LEGAL ANALYSIS

##### A. *Unfairness of the Current Aggravated Sexual Assault Statute to Victims of Intrafamilial Sexual Assault*

*It is regarded as axiomatic that parents have more power than children. . . children need the unconditional protection and nurturance of their parents for healthy development; they cannot provide care in return. Parents may find many rewards in the raising of children, but they cannot expect their own needs for food, clothing, shelter, or sex to be fulfilled by their children.*<sup>162</sup>

The current requirements of aggravated sexual assault are unfair to victims of intrafamilial sexual abuse. They are unfair because courts reason that previous sexual activity usually equates to consent.<sup>163</sup> If the sexual abuse occurred repeatedly, the victim was considered able to consent. If

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161. TEX. PEN. CODE ANN. § 22.021 (Vernon Supp. 2003). Section that is in bold is suggested additional material. Material surrounded by <> are deletions.

162. HERMAN, *supra* note 24, at 3-4.

163. Maryanne Lyons, *Adolescents in Jeopardy: An Analysis of Texas' Promiscuity Defense for Sexual Assault*, 29 HOUS. L. REV. 583, 597 (1992).



the victim is able to consent, the victim, regardless of their age, is required to resist and the perpetrator has to use force for the sexual act to be considered sexual assault. The victims of intrafamilial sexual assault rarely suffer serious bodily injury at the hands of their family perpetrator.<sup>164</sup> The family perpetrator rarely has to use force to sexually assault a family member. Therefore, because the dynamics of intrafamilial sexual assault<sup>165</sup> are not addressed by the requirements of aggravated sexual assault, victims are unfairly prevented from seeking the highest penalty possible for sexual assault.<sup>166</sup>

The court also unfairly reasons that a long period of sexual abuse is indicative of the victim's consent. This line of reasoning should no longer be followed for two reasons. First, victims of intrafamilial sexual abuse are usually abused over a period of many years before it is discovered.<sup>167</sup> This long period of time is associated with the relationship between the parties more than the consent or promiscuity of the victim.<sup>168</sup> The power the parental or authority figure has over the victim in providing essential needs, and threats to other family members is more likely the reasons for compliance than consent.<sup>169</sup> Additionally, the shame and guilt the victim has about the sexual acts forced upon them combined with the desire to please the parent, obtain essential necessities of life for themselves and possibly other family members is enough to keep the adolescent victim quiet.<sup>170</sup>

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164. See Lindberg & Distad, *Post-Traumatic Stress Disorders in Women Who Experienced Childhood Incest*, 9 CHILD ABUSE & NEGLECT 329, 330 (1985) (relating that the most significant and long-lasting effect of intrafamilial sexual abuse is the victim's impaired emotionality).

165. See Camille W. Cook & Pamela Kirkwood Millsaps, *Redressing Wrongs Of The Blamelessly Ignorant Survivor Of Incest*, 26 U. RICH. L. REV. 1, 8-9 (1991) (stating that an incestuously abusive father is careful not to beat his daughter to the extent that medical attention is necessary, or to the extent that outside attention is focused on his daughter's injuries or his abuse).

166. CHILD ABUSE REPORTED TO THE POLICE, *supra* note 12 (stating that "sentences for offenders against teenage victims were less severe than for other offenders").

167. See MARY DE YOUNG, *THE SEXUAL VICTIMIZATION OF CHILDREN* 37 (1982) (stating the average duration of an incestuous affair is 2.7 years in Young's clinical sample).

168. See HERMAN, *supra* note 24, at 3 (stating that the father and daughter, adult male and female child, relationship is one of the most unequal relationships imaginable). "The actual sexual encounter may be brutal or tender, painful or pleasurable; but it is always, inevitably, destructive to the child. The father, in effect, forces the daughter to pay with her body for affection and care which should be freely given." *Id.*

169. See Thomas, *supra* note 7 (stating that victims of "intrafamilial sexual abuse, the child's reluctance to seek intervention is compounded by the child's emotional and financial dependency").

170. Melissa G. Salten, *Statutes of Limitations in Civil Incest Suits: Preserving the Victim's Remedy*, 7 HARV. WOMEN'S L.J. 189, 198 (1984).

Second, repeatedly committing intrafamilial sexual abuse is an aggravating factor that should increase the severity of the crime and the perpetrator's propensity for crime, rather than strengthen the notion of consent by the adolescent. This repetitive criminal activity is not treated as consent by a victim in regards to theft, murder or battery and should not be treated as such in the case of intrafamilial sexual abuse.

Also unfair is the current statutory implication that adolescents fourteen to sixteen years of age possess the ability to protect themselves from an unwanted sexual encounter, especially from a family member. Adolescent victims who suffer at the hands of family members are in fear for their own lives. Their choice is food, clothing, shelter, safety for themselves or for other family members with compliance or the possibility of no food, clothing, shelter or physical suffering or the suffering of other family members if there is non-compliance<sup>171</sup>. When these possible choices are presented, society should not assume that adolescents fourteen to sixteen years of age possess the ability to protect themselves from unwanted sexual encounters by family members who may hold what seems to the adolescent victim as their whole lives in their control.

*B. Policy of Non-Interference in the Family Furthers the Situation Ripe for Continued Intrafamilial Sexual Abuse*

Texas should realize that there are situations where the family unit does not need to be preserved because the family itself can be an instrument of sexual abuse.<sup>172</sup> The parent or authority figure has a position of trust and authority over the younger family member. This same position of trust and authority can be used to tell the victim that the sexual contact is normal or expected behavior in their family.<sup>173</sup>

Due to the position of trust and authority of the family member, the perpetrator has long periods of time to groom their victim.<sup>174</sup> The perpetrator can establish this by sleeping with their victims in the nude, giving them baths and accidentally fondling them. The perpetrator will also find ways for the victim to see them nude to make it seem more natural and right. All these grooming actions establish a confusing situation for a child who loves and wants to please the parental figure. The step from

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171. See DE YOUNG, *supra* note 167, at 37-38 (stating that some incestuous relationships are continued through force and threats against other family members).

172. See John R. Schmidt, *Forward*, 92 Nw. U.L. REV. 1197, 1200 (1998) (noting that when dealing with intrafamilial sexual abuse we must break down cultural taboos that have kept it from view because of historical patriarchal control).

173. See *Evans v. Eckelman*, 216 Cal.App.3d 1609, 1616, 265 Cal.Reptr. 605, 609 (1990) (stating that intrafamilial sexual abuse may be accomplished "by teaching the child that the sexual acts are normal or necessary to the relationship").

174. Loue, *supra* note 2, at 479.

sleeping together and touching to sexual intercourse may proceed over years and may never have required force. Force, if used, may have only been required in the beginning of the sexual assaults and after continued abuse is no longer needed by the perpetrator. The long period of access to the victim by the family perpetrator combined with their position of trust and authority, and the unwillingness to separate family members furthers the situation for continued abuse by the family perpetrator.

As long as Texas hesitates to interfere in the family by focusing on force and serious bodily injury, the adolescent victim will continue to suffer intrafamilial sexual assault. By focusing on the adolescent victims' action of resistance, force and serious bodily injury, the court has to focus less on the family perpetrator and the action of having sexual intercourse with a child.<sup>175</sup> The less the court has to focus on the family perpetrator and his/her action, the less we as a society have to deal with the real problem of family members who violate the sanctity of the family for their own deviate sexual desires. This reasoning to keep the family unit together furthers the most powerful tool of the family perpetrator, which is their position in the family.

With the above policy and judicial gymnastics to avoid the possible untrue allegation of an incestuous relationship, it would seem that as a collective society we do not wish to confront the family perpetrator.<sup>176</sup> The act of incestuous sexual abuse is too ugly to confront with a law that would say to family perpetrators unequivocally it is wrong. Our society continues to believe that it only happens in other families and places blame on the victim if it does happen.<sup>177</sup> This keeps society from individually examining one's own life. A life which may include sexual feelings for older family members or sexual interplay.<sup>178</sup> The distance keeps society from recognizing and accepting possible sexual feelings for their own children as they grow.<sup>179</sup> This aversion to accept our own experiences

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175. See Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 UNIV. MIAMI L. REV. 127, 129-30 (stating that the government must hear the full range of legitimate concerns, no matter how indelicately expressed or painful they may be to hear).

176. See *id.* (stating that similar to rape victims, victims of racism must prove they did not distort the circumstances, misunderstand the intent, or even enjoy it).

177. See DE YOUNG *supra* note 167, at 24 (stating that conclusions such as the female victim of incest is to blame for reasons like favoring her mother physically and stating that the daughter seduces or encourages the incest place blame on the victim and minimize the roles of the father perpetrators).

178. See HERMAN *supra* note 24, at 130 (noting the common reaction of intrafamilial sexual abuse is shock and outrage then followed by denial).

179. See JEFFREY J. HAUGAARD & N. DICKON RUPPUCI, *THE SEXUAL ABUSE OF CHILDREN* 108 (1988) (stating that whether the strong "emotional reaction is a result of the repressed incest desires, an innate aversion to incest, or some other aspect of the human

prevents society from openly discussing intrafamilial sexual abuse and developing appropriate laws addressing the matter.<sup>180</sup> Society must acknowledge that a thought about our children does not make us the same as those that commit the act of intrafamilial sexual assault.

C. *Incorrectness of Federal Programs Forcing States to Ignore Intrafamilial Sexual Assault*

The federal government should not pass "The Care Act of 1999" to protect children of every state from intrafamilial sexual abuse. If re-introduced and passed, adolescent victims of intrafamilial sexual assault would suffer more when states do not fully comply and subsequently lose funding. The adolescent victim would lose on two levels. The child would lose any state money available to receive help and would not be able to prosecute the family perpetrator to the fullest degree because the state's laws have not changed. Policy should be changed in every state by their state legislation. Every state should implement an exception to their highest degree of sexual assault so that an adolescent victim of intrafamilial sexual assault will not have to prove force. This would be the same exception Texas currently provides for sexual assault victims who are under fourteen years of age, over sixty-five years of age, and victims who are incapacitated in some way so they cannot resist their perpetrator.

D. *Correction of Past Policies that Left the Adolescent Victim of Intrafamilial Sexual Assault Unprotected*

To correct this gap in protection for adolescent victims of intrafamilial sexual abuse legislators must implement two changes. First, legislators must remove the incest statutes from the criminal code. Currently, the incest statute only protects females from intrafamilial sexual intercourse by male family members.<sup>181</sup> Both males and females are victims of intrafamilial sexual abuse and both need protection. In addition, the premise behind incest is that it is an offense against society in which both parties ordinarily engage with the same intent and purpose as princi-

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psyche is not known. But the reality is that something clearly drives most of us to avoid not only incest experiences but also incestuous thoughts").

180. See DE YOUNG, *supra* note 167, at 161 (noting that there are prices to pay for ignorance to incest has "served as a foundation upon which many legal and social practices have been built, sexually victimized children are being constantly revictimized by a system and a society unwilling to confront the problem").

181. See TEX. PEN. CODE ANN. § 25.02 (Vernon 1994) (defining "sexual intercourse as any penetration of the female sex organ by the male sex organ" and "deviate sexual intercourse is contact between genitals of one person and the mouth or anus of another person").

pals.<sup>182</sup> Assumingly, if both parties engage in incest with the same intent they are both adults and not in reliance on the other for the necessities of life and free to make their own decisions. In addition, the incest statutes do not refer to any age requirement. Thus, any one of any age involved in a relationship with another that is too closely related is punishable by a third degree felony, which is punishable by no more than 10 years but not less than two years. As we have historically looked at the incest laws they were meant to apply to adults, not children. To correct this discrepancy in applicability, legislators need to add language making the statute applicable only to those over the age of seventeen. Once the incest statute is removed from the criminal code, perpetrators of intrafamilial sexual assault can only be prosecuted under the sexual assault and aggravated sexual assault statutes.

Secondly, legislators must implement the intrafamilial sexual assault exception to the force requirement of aggravated sexual assault. This exception will delete any confusion on which statute to charge the perpetrator of intrafamilial sexual abuse under and delete any need for prosecutors to charge bargain with perpetrators. This exception will also take into account the special relationship between the perpetrator and the victim that usually does not include force. The exception will also recognize and validate research and findings by the psychology, medical and law enforcement fields regarding the dynamics of intrafamilial sexual abuse. The resulting aggravated sexual assault statute will protect any child under the age of fourteen from sexual assault regardless of the relation to the perpetrator. Furthermore, the resulting statute will protect those adolescents fourteen to sixteen years of age to the same extent if the perpetrator were within a certain degree of relation to the victim. This exception will not provide more protection to a certain class of adolescents but provide harsher penalties to perpetrators who prey on their own young family members.

Texas should push for approval of these statutory changes because currently the judiciary interprets intrafamilial sexual assault as any other sexual assault that does not result in serious bodily injury. If we leave the policy determination up to the courts, then adolescents who suffer sexual abuse by family members are at the mercy of judicial interpretations of the implied threat to seek a higher charge against their perpetrator. Texas should not allow the prosecution of a family perpetrator to be determined by judicial interpretation that can be eroded or reversed depending on who is hearing the case. This was seen in Alabama courts

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182. *See id.* (stating the statute to qualify for incest but not mentioning any requirement for consent by the victim or force by the perpetrator, thus both parties can be in agreement to the sexual act and still violate the statute).

where there is also no statutory exception for victims of intrafamilial sexual assault.<sup>183</sup>

Neither should society settle for an empty exception to the sexual assault statute by our legislators.<sup>184</sup> This empty exception has been adopted by many states and provides no more protection to victims of intrafamilial sexual assault than before the exception.<sup>185</sup> Perpetrators of intrafamilial sexual assault would receive a charge of sexual assault with or without the exception. So the exception in most states provides no more protection and the aggravating factor is still the use of force resulting in serious bodily injury. Since serious bodily injury resulting from force rarely occurs in intrafamilial sexual assault the victims is kept from seeking a higher penalty because of the dynamics that brought about the crime. The perpetrator has benefited from sexually assaulting his relatives rather than seeking other non-related children.<sup>186</sup>

With these changes to the laws regarding aggravated sexual assault, Texas will send an appropriate message to perpetrators of intrafamilial sexual assault. The message will be that if a parent or a person in position of authority or trust engages in sexual intercourse with a family member or someone in their care, they will suffer the possible penalty of life imprisonment. This is regardless of their own beliefs in regards to what they can do with their own children, their mental state, or whether or not they used force or caused serious bodily injury to the victim. This exception to the statute will not promote the family status of the perpetrator but protect the victim of intrafamilial sexual assault.

## V. CONCLUSION

Currently, Texas fails to protect the adolescent victim of intrafamilial sexual assault fourteen to sixteen years of age because the statute requires force resulting in serious bodily injury to seek aggravated sexual assault rather than sexual assault. The current statute fails because intrafamilial sexual assault does not usually result in serious bodily injury. The position of a parent or an older sibling may not need to threaten the

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183. ALA. CODE § 13A-6-61 (2003).

184. See Robert E. Freeman-Longo, *The Treatment of Sex Offenders: Reducing Sexual Abuse in America: Legislating Tougher Laws or Public Education and Prevention*, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 303, 316 (1997).

185. ARIZ. REV. STAT. ANN. §§ 13-1405 to -1410 (West 2001 & Supp. 2002); ARK. CODE ANN. § 5-14-124 (Michie 2000); DEL. CODE ANN. tit. 11 § 772 (2001); N.M. STAT. ANN. §§ 30-9-11, 30-9-13 (Michie 2002); MINN. STAT. § 609.342-.343 (West 1987 & Supp. 2003).

186. See Andrew Vachss, *Our Endangered Species: A Hard Look At How We Treat Our Children*, PARADE, Mar. 29, 1998 (stating that we provide a special immunity for predators who grow their own children).

victim with serious bodily injury, or death to participate in an unwanted sexual act. The closeness and authoritative role of an older family member may be in itself an implied threat known to the victim as "Do what I say or you know what will happen." Texas should not imply by statute that those adolescents who suffer serious bodily injury or threats thereof are more damaged than those adolescents who suffer in silent compliance. This reasoning is an exercise in diverting attention from the family perpetrator and ignoring the costs to adolescents. In recognizing the cost of intrafamilial sexual assault to adolescent victims,<sup>187</sup> Texas should not require a showing of force that results in serious bodily injury or threats of death or serious bodily injury to prove aggravated sexual assault for victims fourteen to sixteen years of age of intrafamilial sexual abuse.

In addition, neither should Texas rely on the courts' possible interpretation of the implied threat to constitute aggravated sexual assault to nullify the need for statutory exception. The Texas courts currently only extend the implied threat of intrafamilial sexual abuse to a charge of sexual assault. Since, a sexual assault charge does not require serious bodily injury resulting from force this interpretation of implied threat is unnecessary. In essence, Texas is stating that intrafamilial sexual assault should not be considered as serious bodily injury to adolescent victims. On the contrary, adolescent victims of intrafamilial abuse suffer life long complications<sup>188</sup> due to this abuse that affects society as a whole.

In adopting this exception, Texas will protect all children regardless of age or presence of force, who suffer sexual abuse at the hands of family members. As a result, all incidents of intrafamilial sexual abuse will constitute aggravated sexual assault. The judge or jury will have discretion to review the totality of circumstances when determining the punishment of the perpetrator.

Lastly, this exception would delete the comfort that some intrafamilial perpetrators find with the current rule. The prospect of a life sentence may keep someone from violating this statute and also encourage a victim to come forward with the knowledge that the courts will not question their compliance as consent but as a method to survive.

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187. See DAVID FINKELHOR, A SOURCEBOOK ON CHILD SEXUAL ABUSE 143-52 (1986) (showing that short-term affects as reactions occurring within two years of the abuse fear, anger, hostility, guilt and shame. Long-term affects anxiety and distress, pregnancy, inappropriate sexual behavior, runaways and delinquency).

188. See Robin Fretwell Wilson, *Children At Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251, 277-78 (2001) (relating that although some symptoms of sexual abuse may be short lived, others become ingrained, altering even a child's physiology). Along with experiencing posttraumatic stress disorder, anger aggressive behavior, poor self-image, depression, suicidal ideation, there is evidence that victims of sexual abuse also have elevated hormone levels together with evidence of earlier onset of puberty. *Id.*

